Supreme Court, U.S.
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No. 02-367

In The

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,

Petitioner,

v.

TERRY GEYE and BRANDON GEYE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO PETITIONER'S FOURTH SUPPLEMENTAL BRIEF

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RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO PETITIONER'S FOURTH SUPPLEMENTAL BRIEF

Until now, respondents have not felt compelled to respond to the deluge of extra paper foisted on the Court by petitioner. Although purportedly filed to bring to this Court's attention a recent Fifth Circuit decision (that could easily be explained in a paragraph or two), petitioner's **fourth** supplemental brief goes on for four pages rehashing arguments made in its five previous filings. Two of petitioner's statements, however, warrant a brief response because of their potential for confusion concerning the procedural posture of this case.

First, petitioner points to the Fifth Circuit's holding that the fraud, breach of warranty, and Texas Deceptive Trade Practices Act claims at issue there were preempted by FIFRA because, in that case, there was no evidence that the claims were based on "off-label" representations that differed from claims made on the label. Pet's Fourth Supp. Br. 3. But, **in this case**, as both we and the Solicitor General have previously explained (Opp. 1-2, 2a-3a; Gov't Br. 6), the Geyes specifically maintain that petitioner did in fact make off-label representations that are wholly unrelated to the content of the product label. This fact not only may bear on the preemption analysis, but, more importantly for present purposes, it demonstrates that the decision below is not "final" under 28 U.S.C. § 1257(a). That is so because the Geyes' non-label claims would have to be considered on remand even if this Court were to reverse the Texas Supreme Court's decision below on the question presented in the petition.

Second, petitioner buries in a footnote the only aspect of the Fifth Circuit's decision that bears on whether this case is "cert-worthy." The Fifth Circuit noted that the decision of the

Texas Supreme Court below "proceeds from the assumption that the claims at issue did not relate to product labeling." *See* Pet's Fourth Supp. Br. 4 n.3 (quoting *Dow AgroSciences LLC v. Bates*, __ F.3d. ___, 2003 WL 21221722, at *5 (5th Cir. June 11, 2003)). As the Solicitor General has demonstrated in detail (Gov't Br. 9-16), the characterization of the Geyes' claims as not label-based is accurate, at the very least with respect to those claims that focus on petitioner's off-label representations. Once again, that fact dooms the petition because it demonstrates that this Court lacks jurisdiction to review the Texas Supreme Court's decision under 28 U.S.C. § 1257(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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